

Wang (Migration) [2017] AATA 2545 (20 November 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Ms Haini Wang Mr Tianyuan Song
CASE NUMBER:	1619695
DIBP REFERENCE(S):	BCC2014/3561925
MEMBER:	Antoinette Younes
DATE:	20 November 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2)(a) of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations.

Statement made on 20 November 2017 at 5:12pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) visa – Married in Australia – Shared household – Genuine and continuing spousal relationship

LEGISLATION

Migration Act 1958 ss 5F, 5F(2)(a)-(d), 65

Migration Regulations 1994 rr 1.15A(3), Schedule 2 cls 820.211(2)(a), 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 11 November 2016 to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named applicant (the applicant) applied for the visa on 27 December 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need to satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a).
4. The applicant and the sponsor appeared before the Tribunal on 16 November 2017 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. The applicants were represented in relation to the review by their registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether cl.820.211(2)(a).

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australia citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties were married on 21 December 2014. On the

evidence, the Tribunal finds that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

11. In support of the visa application and the application for review, the applicant provided a number of documents, including:
 - a. NSW Marriage Certificate.
 - b. Statements of visa applicant, sponsor and others.
 - c. Statutory Declarations by supporting witnesses (Forms 888).
 - d. Photographs and cards.
 - e. Residential Tenancy Agreement for Eastwood property in joint names.
 - f. Bank of Queensland (BOQ) joint account statements.
 - g. Will of the applicant referring to the sponsor as being a 50% beneficiary.
 - h. Centrelink authority form nominating the applicant as the authorised person for contact.

12. *Financial aspects of the relationship*

13. The couple lives in rented accommodation in Eastwood. They live in a 7 bedroom house with 4 other tenants. They pay \$200 a week for their share. The residential tenancy agreement is in the name of both the applicant and the sponsor. They have a joint account showing regular deposits and withdrawals. The applicant works part-time earning up to \$300 a week. Her pay is deposited into the joint account. The sponsor suffers from Ataxia and as a result he cannot stand or walk. He is designated as fully disabled by Centrelink and is in receipt of a disability pension of about \$669 a fortnight, paid into the joint BOQ account.
14. The BOQ account shows regular household expenditure in terms of food and other everyday costs were paid from that account.
15. On the evidence before it, the Tribunal is satisfied that the parties pool their financial resources and share household expenditure. The Tribunal finds that the financial aspects of the parties' relationship are consistent with the couple being in a genuine and continuing spousal relationship.

16. *Nature of the household*

17. The applicant is divorced and the sponsor has never been married. The applicant has a 20-year-old son who is the secondary applicant. The son lives with the couple in the Eastwood house, in a separate room. The applicant and the sponsor live in separate rooms, due to the sponsor's medical condition. The sponsor has never had any children.
18. Given the sponsor's ill health, the Tribunal is not concerned about the couple having separate rooms. The Tribunal does not consider it to be problematic for the parties to have separate rooms.
19. The Tribunal accepts that the parties have lived together after their marriage. The couple provided consistent evidence regarding the arrangements for their household. The Tribunal

is satisfied on the evidence that the nature of the household supports the finding of a genuine and continuing relationship.

20. *Social aspects of the relationship*

21. The parties provided a number of statutory declarations attesting to the genuineness of the relationship. The information in these declarations is consistent with the other evidence before the Tribunal.
22. The Tribunal found the oral evidence provided by the parties to be consistent and persuasive evidence that the parties have been in a loving couple relationship for many years and that they provide one another with considerable support.
23. Although the applicant has provided limited corroborative evidence relating to the social aspects of the relationship, the evidence provided by way of photographs and statutory declarations support the finding that the relationship between the applicant and the sponsor is recognised and supported by their family and friends. The Tribunal is satisfied that the couple presents as being married to one another to their family, friends and the wider community.

24. *Nature of the person's commitment to each other*

25. On the evidence before it, the Tribunal finds that the applicant and the sponsor have been in a committed relationship since they married in December 2014 and that they have lived together continuously since their marriage.
26. The Tribunal has conducted the hearing and met both the applicant and the sponsor. Although the Tribunal is cautious to make conclusions on the basis of personal observations, the Tribunal is satisfied that they presented as a couple who are committed to each other. The Tribunal was impressed with both the sponsor and the applicant who came across as being compassionate people. The Tribunal asked direct questions about their intentions and the Tribunal is satisfied that their responses demonstrated commitment to one another.
27. The applicant provided a letter of support, dated 19 December 2016, from Dr Therese Houwing who commented on the sponsor being dependent on the applicant for all his basic needs and that the applicant has displayed a genuine concern for the sponsor's health and well-being.
28. The couple's evidence was consistent and demonstrated knowledge of each other's lives and background.
29. The Tribunal is satisfied that the applicant and her partner are committed to being in a long-term relationship supporting the finding that the parties are in a genuine and continuing relationship.

30. *CONCLUSIONS*

31. In consideration of the evidence as a whole and in light of the above findings, the Tribunal is satisfied that at the time of application and at the time of this decision, the applicant and sponsor are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is satisfied the applicant and sponsor live together and therefore do not live separately and apart on a permanent basis.

32. On the evidence, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
33. In consideration of the evidence as a whole and for the stated reasons, the Tribunal is satisfied that the applicant meets cl.820.211(2)(a) and cl.820.221.
34. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
35. In relation to the second applicant, and as discussed in the course of the hearing, his application was on the basis of being a member of the family unit of the applicant. The second applicant is now over the age of 18 years and the dependency issue was not determined by the Department. The appropriate course in relation to the second applicant is for the Department to consider whether he meets the criteria of a secondary applicant.

DECISION

36. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2)(a) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations.

Antoinette Younes
Senior Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).